IN THE

Supreme Court of the United States

NO. 76-738

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner

v.

CECIL MARTIN,
Respondent

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner

v.

JERRY BRIGMON,
Respondent

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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To the Honorable Supreme Court of the United States:

QUESTIONS PRESENTED FOR REVIEW

The question here presented is whether the Fifth Circuit Court of Appeals properly applied the holding of this Court in *United Mine Workers v. Gibbs.*[1]

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1. *United Mine Workers v. Gibbs,* 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130.

STATEMENT OF THE CASE

The statement of the case made by the Petitioner is largely correct with the exceptions hereinafter noted. Suit was filed originally for the two Plaintiffs alleging two causes of action: one under the Federal Employers' Liability Act and one for negligence under the Louisiana law. Jurisdiction was denied by the Defendant generally. The Court found specifically that it had jurisdiction and it found in favor of both Plaintiffs.

At no time did the Defendant call to the attention of the Trial Court its claim that the Court lacked jurisdiction. Rather this claim was made for the first time, when the case was on appeal, some three and one-half years after the original complaint was filed and only two weeks before the case was set for oral argument in the Court of Civil Appeals.

The Court of Civil Appeals held that whether or not there was diversity jurisdiction the Trial Court most certainly had pendent jurisdiction under the dictates of *United Mine Workers v. Gibbs.*[2]

THE OPINION BELOW

The opinion of the Court of Civil Appeals is reproduced as Appendix A-5 of Petitioner's Brief. It correctly applied the rule announced by this Court in *Gibbs*[3] that where two causes of action are alleged, one under the Federal law and one under state law, a Federal court has pendent jurisdiction to try the entire case. This is true even though the Federal cause of action may fail,

2. *Ibid.*

3. *Ibid.*

leaving for determination only the state cause of action over which the Court would not have had jurisdiction had it been brought separately.

ARGUMENT AND AUTHORITIES

This case fits squarely within the *Gibbs* rule and the Court of Appeals was imminently correct in affirming the action of the Trial Court.

As stated, the Plaintiffs alleged alternative courses of action under the Federal Employers' Liability Act and the law of Louisiana. The main thrust of the Plaintiffs' case was in connection with the FELA cause of action. While the case was under advisement and before decision, the case of *Culpepper v. Daniel Industries*[4] was brought to the attention of the Court. This meant that the Texas two year statute of limitation would apply, in place of the Louisiana one year statute, and that the Plaintiffs' cause of action for negligence under the Louisiana law was viable. With these developments, the Trial Court ordered a hearing of the parties. As a result of this hearing, the Trial Court issued an order wherein it found that it had jurisdiction and it gave the parties permission to reopen and present additional evidence on all matters. It provided further that it would be necessary to present evidence already presented and that the same would be considered by the Court. The hearing date to allow additional evidence was set four months in advance. The Defendant offered no further proof.

The Plaintiffs at no time abandoned their FELA claim nor did they ever withdraw their proposed Findings of

4. *Culpepper v. Daniel Industries,* 500 S.W.2d 958 (Tex. Civ. App. 1973).

Fact in regard thereto. The Court found for the Plaintiffs on their negligence claim but specifically stated that it was not deciding the FELA issues because its disposition of the negligence claim made it unnecessary to do so.

THE DIVERSITY ISSUE

It is submitted that the action of the Trial Court in finding that it had jurisdiction is justified under either diversity jurisdiction or pendent jurisdiction.

The Supreme Court has stated that it was the intention of Congress to "leave the mode of raising and trying such issues (as jurisdiction) to the discretion of the trial judge."[5] Here the Court made a specific finding that jurisdiction exists.

The most the Defendant ever did to challenge jurisdiction was to make a general denial of the allegation. It is firmly established that after jurisdiction is challenged the Plaintiff must have an opportunity to present facts by affidavit, or by deposition, or in an evidentiary hearing in support of its jurisdiction contention.[6] In spite of this the Defendant at no time during the trial stage advised the Court or opposing counsel, except by general denial, that the diversity jurisdiction of the Court was being challenged. The Trial Court therefore had no opportunity or reason to conduct a full-fledged hearing on diversity.

It is significant to note that the Defendant does not assert that from the record the Court *lacks* jurisdiction.

5. *McNutt v. G.M.A.C.*, 298 U.S. 178, 80 L.Ed. 1135.

6. *Local 336, American Federation of Musicians AFL-CIO v. Bonatz*, (3rd Cir. 1973), 475 F.2d 433; *Groh v. Brooks*, 421 F.2d 589 (3rd Cir. 1970); *Shahmoon Industries, Inc. v. Imperato*, 338 F.2d 449 (3rd Cir. 1964).

Rather, it asserts that it has not been proved. The residence of the Defendant is peculiarly within the knowledge of the Defendant. Why it waited until shortly before the case was to be submitted to the Court of Civil Appeals to raise this question is known only to the Defendant. One is left only to speculate as to whether the Defendant can in fact refute the allegations and findings of diversity or whether in truth and in fact it wants a new trial with the hope of better results.

PENDENT JURISDICTION

In any event, it is clearly established that the Trial Court had pendent jurisdiction. The rule in *Gibbs* is simply: where a cause of action embraces two claims, one a common law or state claim, and the other a Federal claim, arising from the same operative facts, the Trial Court could and should dispose of both claims in the same course of action.[7]

The facts in the case at bar essentially are the same as Gibbs. In *Gibbs* there was a claim under a Federal statute (secondary boycott) and a state claim under the law of Tennessee for interference with the employment relationship with the plaintiff. In fact, the Federal claim failed, but nevertheless the Court held that the Trial Court had jurisdiction to determine the state court claim because they both arose from the same operative set of facts. The Defendant here does not question the holding of the Court of Civil Appeals that both causes of action arise from the same nucleus of operative fact.

7. *Supra*, fn. 1, p. 228; and see *Beverly Hills National Bank & Trust Co. v. Compania De Nav. Almirante*, 437 F.2d 301 (9th Cir. 1971).

SUBSTANTIVE FEDERAL CLAIM

Finally the Defendant argues the Plaintiffs' Federal claim is not substantial as required by *Gibbs*. The question of whether or not a substantive Federal claim exists is to be determined from the pleadings.[8]

The test of whether a claim is "substantial" is the same as that applied in determining whether a claim should be dismissed for want of jurisdiction rather than on its merits.[9] In such determination the allegations of the Plaintiffs' Complaint must be taken as true.[10]

In the case at bar a substantial portion of the proof was in connection with the FELA claim.[11] The Trial Court recognized that it was a "close question" whether the Plaintiff should prevail on the FELA claim. Significantly the Trial Court found that it was not deciding the FELA claim as there was no need to because of its disposition of the state claim.

The pleadings and the record leave no other conclusion but that the Federal claim was "substantive".

JURISDICTION WILL BE FOUND WHERE IT CAN BE SUPPORTED ON ANY BASIS

The Supreme Court has firmly established the rule that where a case is tried in the Federal courts and juris-

8. *Supra*, fn. 1, p. 229; *Tully v. Mott Supermarkets, Inc.*, (D.C. NJ 1972), 337 F.Supp. 834.

9. *A. H. Emery Co. v. Marcan Products Corp.*, (C.A. 2d 1968), 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

10. *Lasher v. Shafer*, 460 F.2d 343 (1972, 3rd Cir.).

11. Some 69 pages of the Record were devoted to proof and briefs in support of Plaintiffs' FELA claim.

diction is raised for the first time on appeal the question IS NOT whether the Court properly asserted or acquired jurisdiction, but rather whether jurisdiction existed at the time it entered judgment.[12] *Grubbs* was a removal case and jurisdiction was raised for the first time on appeal *sua sponte* by the Appellate Court. Reversing the holding of the Court of Appeals that there was no Federal jurisdiction, the Supreme Court held that whether or not the case was properly removed the District Court had jurisdiction when the suit was filed and therefore jurisdiction existed.[13]

It is clear from this holding that the Supreme Court has adopted the view that when a case is tried in the Federal Courts, jurisdiction will be found where it can be supported on any basis. This is true regardless of how the Federal Court acquired jurisdiction. Certainly the case at bar comes within this rule as the Trial Court had jurisdiction by virtue of the FELA claim irrespective of the diversity issue.

12. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 31 L.Ed. 612, 92 S.Ct. 1344.

13. *Ibid.*

CONCLUSION

It is submitted that the Court of Civil Appeals correctly applied the *Gibbs* rule to this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Respondents in Opposition was mailed, postage prepaid, properly addressed, to Mr. Bryan J. McGinnis, 1400 San Jacinto Building, Beaumont, Texas 77701, attorney for Petitioner, on this the ____ day of December, 1976.

_____
Of Counsel